

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TEXAS  
                  TYLER DIVISION

3   PARALLEL NETWORKS                   )  
  )   DOCKET NO. 6:10cv111  
4         -vs-                            )  
  )   Tyler, Texas  
5   ABERCROMBIE & FITCH CO.,           )   10:30 a.m.  
  ET AL                                 )   March 1, 2011  
6   \*\*\*\*\*

7   PARALLEL NETWORKS                   )  
  )   DOCKET NO. 6:10cv112  
8         -vs-                            )  
  )  
9   BENTLEY MOTORS, INC., ET AL        )  
  \*\*\*\*\*

10   PARALLEL NETWORKS                  )  
  )   DOCKET NO. 6:10cv275  
11         -vs-                            )  
  )  
12   AEO, INC., ET AL                   )  
  \*\*\*\*\*

13   PARALLEL NETWORKS                  )  
  )   DOCKET NO. 6:10cv491  
14         -vs-                            )  
  )  
15   ADIDAS AMERICA, INC., ET AL        )

16

17                   TRANSCRIPT OF STATUS HEARING  
18                   BEFORE THE HONORABLE LEONARD DAVIS,  
                  UNITED STATES DISTRICT JUDGE

19

A P P E A R A N C E S

20

21                   (SEE SIGN-IN SHEETS)

22   COURT REPORTER:                   MS. SHEA SLOAN  
  211 West Ferguson  
23   Tyler, Texas 75702

24

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. Ms. Ferguson, if you will call the case,  
4 please --

5 THE CLERK: Court calls --

6 THE COURT: -- cases.

7 THE CLERK: Yes, Your Honor. Court calls Cases No.  
8 6:10cv111, Parallel v. Abercrombie; 6:10cv112, Parallel v.  
9 Bentley Motors, et al; 6:10cv275, Parallel v. AEO; and the  
10 the last case, 6:10cv491, Parallel v. Adidas, et al.

11 THE COURT: All right. Let me have announcements.  
12 If you are representing parties in more than one case, just  
13 make that designation -- answer in all of the cases saying  
14 which cases and which parties you are representing.

15 So, Plaintiffs?

16 MR. TADLOCK: Thank you. Good morning, Your Honor.  
17 Craig Tadlock for the plaintiff, Parallel Networks in all four  
18 cases, of course. With me is our Lead Counsel Mr. George  
19 Bosy. And also Mr. David Bennett from Bosy & Bennett.

20 Also with me is Mr. Terry Fokas of Parallel  
21 Networks. Mr. Fokas is also a member of the bar of this  
22 Court.

23 With the Court's indulgence, Mr. Bosy will be our  
24 primary spokesperson today. We are ready to proceed.

25 THE COURT: Okay. Thank you.

1 MR. JONES: Your Honor -- excuse me, Your Honor.

2 Mike Jones in the 491 case I represent American Suzuki Motor  
3 Corporation with Mr. Matt Moore and Mr. Allen Gardner. Also  
4 in that case I represent Bergdorf Goodman. Also in that case  
5 I represent General Motors.

6 With regard to the 275 case, I represent Redbox  
7 Automated Retail. And in that case I also represent The  
8 Neiman Marcus Group.

9 And, Your Honor, I work with a number of other  
10 National Counsel that are here in those cases. In the  
11 interest of time, I will let them introduce themselves.

12 THE COURT: Very well.

13 MR. JONES: Thank you, Your Honor.

14 MR. CORDELL: Good morning, Your Honor. Ruffin  
15 Cordell with Fish & Richardson. With me is David Conrad from  
16 my Dallas office. We are here this morning in the 111 case on  
17 behalf of Amazon, IAC Search, Brain Busters, Shoebuy, Kayak  
18 Software, Netflix, the Orbitz companies.

19 And then in the 112 case, we represent Flareview  
20 Travel and Flightbookers.

21 In the 275 case we represent Barnes & Noble, Brawn,  
22 Cabela's, Continental Airlines, Delta Airlines, Google,  
23 Iconix/IP Holdings, Musicians Friend, Onestop, Tiffany &  
24 Company, TripAdvisor, U.S. Airways, Target Corporation, and  
25 Zappos Retail.

1           Your Honor, I note in the 275 case two of our  
2 defendants, Borders Group and Oriental Trading, have been  
3 severed off because of a bankruptcy issue.

4           In the 491 case we represent Andersen Windows,  
5 ASICS, Chico's, Citizen Watch, Dillard's, Goodyear, Jones  
6 Retail, Macy's/Bloomingdales, Mitsubishi Motors North America,  
7 Subaru, Sunglass Hut, Wolverine, and Women's Apparel Group.

8           MR. HEARTFIELD: Good morning, Your Honor, Thad  
9 Heartfield. I'm here on three of the cases. In the 111 I  
10 represent Disney Online and Time and Maghound with Johnson &  
11 Steptoe. Also in the 111 case with John Bisbikis, I represent  
12 Sears and Kmart, JC Penney, Office Depot, and Gap.

13           Also, with Mr. Bisbikis in both of the other two  
14 cases, 275, we represent Patagonia, Nordstroms, REI, QVC,  
15 Juicy Couture, Liz Claiborne, Williams Sonoma.

16           And in the 491 case, we are here for Kohl's and New  
17 Balance.

18           THE COURT: Thank you.

19           MR. WILCOX: Melvin Wilcox along with Mr. Ray  
20 Churchill in the 275 case. We only represent Sony.

21           THE COURT: Thank you.

22           MR. PATTERSON: Good morning, Judge, I'm Jeff  
23 Patterson in the 491 case. Jeff Cox and I represent the  
24 Nissan Defendants.

25           MR. SORDEN: Your Honor, Gary Sorden for Southwest

1 Airlines in the 275 case.

2 MR. HALLAJ: Ibrahim Hallaj. I represent American  
3 Eagle Outfitters, Inc., and AEO Management Co. in the 275  
4 case.

5 MR. PHILBIN: Your Honor, Phillip Philbin of Haynes  
6 & Boone in the 275 case for Lowe's Home Centers.

7 MR. HAWES: Your Honor, Eric Hawes from Morgan  
8 Lewis. I represent Adidas, Aeropostale, American Girl,  
9 Mattel, Nautica, and Ralph Lauren. They are all in the 491  
10 case.

11 MR. DAVIDSON: Dan Davidson, Your Honor, from  
12 Fulbright & Jaworski in the 111 case. We represent Yahoo!.

13 MS. RACE: Deborah Race in the 275 case and Brooks  
14 Beard and we represent Restoration Hardware.

15 MR. CORNELIUS: Your Honor, Bill Cornelius and Brian  
16 Tollefson for LG Electronics USA in the 491, and with Peter  
17 Brann for Hasbro and Jill in the 491 case. And for Coldwater  
18 Creek in the 275 case.

19 MR. FISCHMAN: Your Honor, Gary Fischman in the 491  
20 case for Brunswick, Procter & Gamble, Gillette,  
21 Harley-Davidson, and -- let me make sure I have them all. I  
22 believe that's it. Thank you, Your Honor.

23 MR. RICE: Your Honor, Ed Rice of Loeb & Loeb for GM  
24 in the 491 case.

25 MR. CRAFT: Your Honor, Brian Craft and Floyd Nation

1 here. We represent AOL and MapQuest in the 275 case.

2 MR. FINDLAY: Good morning, Your Honor, Eric Findlay  
3 representing Motorola and Navistar in the 491 case. With me  
4 for Navistar is Craig Leavell. And with me for Motorola is  
5 Jonathan Sobel. Thank you.

6 MR. CONLEY: Your Honor, Gerald Conley of Andrews &  
7 Kurth for Staples in the 275.

8 MR. ALSOLAM: Ramsey Alsolam from Perkins Coie for  
9 Redbox Automated in the 275 case.

10 MR. SOBEL: Jonathan Sobel, Your Honor, representing  
11 Motorola.

12 MR. DACUS: Good morning, Judge. Deron Dacus here  
13 with Whitney Winston on behalf of Toyota. Also here on behalf  
14 of Volkswagen with John Sweeney, Steve Meyer, and Sergey  
15 Kolmykov. And also on behalf of Bentley. In addition here on  
16 behalf of AT&T, with Chad Ennis, Your Honor.

17 MR. JOHNSON: Good morning, Your Honor. Jeffrey  
18 Johnson. I'm here with Lead Counsel Robert Fuhrer on behalf  
19 of Bass Pro.

20 MS. MILLER: Good morning, Your Honor, Laura Miller  
21 on behalf of Herman Miller, Inc., in the 491 case.

22 MR. WINSTON: Good morning, Your Honor. In addition  
23 to representing Toyota -- my name is Whitney Winston -- I am  
24 also representing Disney Online; ESPN Enterprises; American  
25 Broadcasting Companies; Time, Inc.; and Maghound Enterprises

1 in the 111 case.

2 MR. CROWE: Good morning, Your Honor, Dan Crowe with  
3 Bryan Cave in the 275 case. I represent Neiman Marcus.

4 In the 491 case I represent Bergdorf Goodman.

5 MR. FAULKNER: Good morning, Your Honor, Rick  
6 Faulkner. In the 491 case, I, along with Emmett McMahon of  
7 Robins Kaplan, represent BBY Solutions, Inc., and BestBuy.com.

8 MR. STEVENS: Good morning, Your Honor, Scott  
9 Stevens here for VF Outdoors in the 275 case.

10 MR. THAMES: Good morning, Your Honor, Glenn Thames  
11 for HSN in the 491 case.

12 MR. ENNIS: Good morning, Your Honor, Chad Ennis for  
13 ATInc. in the 491 case.

14 MR. LOVE: Good morning, Your Honor, Greg Love and  
15 Jim Sulentic in the 491 case for Hayneedle, Inc.

16 MR. VEON: Good morning, Your Honor, Robert Veon and  
17 William Oldalch, and we represent Abercrombie & Fitch in the  
18 111 case.

19 MR. RENK: Good morning, Your Honor, Chris Renk.  
20 And with me is Michael Harris. We represent Nike in the 111  
21 case.

22 MR. GILLAM: Gil Gillam and Nathan Johnson, Your  
23 Honor, in the 111 case representing Russell Brands.

24 MR. CARTER: Leon Carter --

25 MR. GILLAM: I'm sorry. I apologize, it is the 491

1 case.

2 MR. CARTER: Leon Carter of Munck Carter in the 111  
3 representing Chase -- JP Morgan Chase Bank.

4 MR. AINSWORTH: Charles Ainsworth and John Ward for  
5 Victoria's Secret in the 491 case.

6 MS. HARGROVE: Good morning, Your Honor, Lindsey  
7 Hargrove of McGuire Woods for Ford Motor Company in the 111  
8 case.

9 MR. RICHARDSON: Good morning, Your Honor, Michael  
10 Richardson and Bob Cultice here in the 491 case for the Kodak  
11 defendants.

12 THE COURT: Okay. Is that everybody?

13 All right. Let me inquire before we go any further  
14 just -- is there -- have the defendants met, and is there  
15 anyone that is speaking on behalf of all or certain groups of  
16 the defendants?

17 MR. JONES: Your Honor, we have certainly met. And  
18 we have talked about the issues we thought would come here  
19 today. On most of those issues I think I am the person that  
20 is prepared to speak with limited authority. When I say  
21 something they don't agree with, they can jump up and tell  
22 you.

23 Then with regard to the various issues like the  
24 motion to bifurcate, I think Mr. Peter Brann is going to  
25 address that. So it depends upon the issue, Your Honor. We



1 have met and tried to gain ideas that we have collectively so  
2 everyone does not have to speak. If that answer the Court's  
3 question.

4 THE COURT: Let me inquire, Mr. Jones, are there  
5 joint defense group agreements among all of the defendants or  
6 among various groups of defendants? Can you give me any  
7 insight into that.

8 MR. JONES: There is a joint defense group  
9 agreement. I guess it -- in open court I am very reluctant to  
10 know what I can say about that, Your Honor.

11 THE COURT: Okay.

12 MR. JONES: Your Honor, I don't know that I can go  
13 any further to respond to the Court's question.

14 THE COURT: All right.

15 MR. JONES: Now --

16 THE COURT: Have you -- whatever joint defense  
17 groups there are, is plaintiff aware of those or not at this  
18 point?

19 MR. JONES: I do not believe so, Your Honor; not to  
20 my knowledge. And if the Court needs more information about  
21 that, it would seem to me in camera there ought to be a way to  
22 do that. I'm not trying to be reluctant.

23 THE COURT: I appreciate your discretion in that  
24 regard.

25 MR. JONES: Thank you, sir.

1           THE COURT: Okay. What I want to do this morning,  
2   and I am prepared to take whatever time is necessary today,  
3   and I appreciate Lead Counsel being here, I want to have a  
4   meaningful discussion about this case, about what plaintiff is  
5   about and hopes to accomplish, what defendants are about, what  
6   they hope to accomplish, and really discuss any and all ideas  
7   to more effectively manage this case.

8           I think this case sets somewhat of a record, at  
9   least in my court, as far as the number of defendants named.  
10   As you can tell by the announcements and the attorneys here, I  
11   think at last count there were 124 defendants that have been  
12   sued.

13           And I will just say quite candidly at first blush  
14   the defense costs to that many defendants all going forward at  
15   one time causes the Court some concern. And I would like to  
16   explore ways of trying to minimize that cost and at the same  
17   time accomplish the objectives of the plaintiff and whatever  
18   their objectives are in bringing the case in the manner they  
19   have and the defendants as far as what their objectives are in  
20   effectively defending their clients, getting the resolution  
21   that they want, settling the case, or defending the case.

22           So with that, I think I would like to just start --  
23   and I take it both sides have given some thought as to what  
24   they think. I have received your briefing. And I would like  
25   to just hear from the plaintiff first, and I will let you make

1 whatever presentation you would like. And then I will hear  
2 from any of the defendants, and then we will have some  
3 discussion.

4 MR. BOSY: Thank you, Your Honor. George Bosy for  
5 Parallel Networks.

6 I would like to address the issue of bifurcation,  
7 the issue of our strategy and desires here, the efficiency  
8 issues that we see as possibilities, and how to conduct  
9 Markman in a way that would be concise and also efficient.  
10 Those are the issues that the Court asked us to look at, and  
11 we have looked at and we have some ideas here.

12 THE COURT: Okay.

13 MR. BOSY: First of all, let me just briefly  
14 explain what the invention is. And one way to do that is by  
15 way of example. And the example that I have is if one wanted  
16 to use, say, a personal computer to access a retail website  
17 to, say, buy shirts.

18 Before the invention, the way that worked was as  
19 follows: You would access the website, you would find out the  
20 shirts that were on offer, you would transmit then your  
21 further desires -- say you wanted white shirts -- and then you  
22 might transfer further requests -- size of the shirts,  
23 quantity of the shirts, price of the shirts. This is before  
24 the invention.

25 What I have just described is a very complicated

1 process. The server at the website had to process all those  
2 requests. There were numerous transmissions between the  
3 personal computer and the website. And the personal computer  
4 was heavily taxed by all of this, too.

5 THE COURT: The personal computer was what?

6 MR. BOSY: Heavily taxed.

7 THE COURT: Okay.

8 MR. BOSY: That worked for a while. And then the  
9 Internet exploded. The number of requests that were going to  
10 websites grew dramatically. And what that caused was very  
11 excess taxing of the servers, communications that were not  
12 going very fast, and also the personal computer couldn't deal  
13 with it all. What that means is it took you a long time to  
14 get what you want.

15 Then comes our invention. Under our invention all  
16 of that is made more efficient. Because what happens is when  
17 you use your personal computer to go to the website, in  
18 general, the website gets the information you want and adds  
19 with it an applet that allows your personal computer to  
20 process this request without going back to the server. So as  
21 an example --

22 THE COURT: It sort of downloads a mini version of  
23 what would be happening at the server?

24 MR. BOSY: Exactly right. So the server would then  
25 send you -- a person doing this -- an applet. That is a small

1 computer program. And it would send you all of the  
2 information. Then you on your personal computer could do all  
3 of the manipulation of the data that you needed. You wouldn't  
4 have to go back to the server. You could select shirts by  
5 color. You could select shirts by size. You could select  
6 shirts by cost.

7 So that is the essence of the invention. It  
8 basically speeds everything up. It takes the load off the  
9 server. It results in fewer communications, and it makes the  
10 work of your personal computer much quicker and more  
11 efficient.

12 And so because this invention is pioneering of its  
13 nature, that is why we see so many people using it. That is  
14 the explanation. The key thing about website access is speed.  
15 And if you don't have speed, you don't have anything.

16 So that, in our view, is why so many entities are  
17 using this technology.

18 With that, let me turn to the issue of bifurcation.

19 THE COURT: Well, before you leave that, let me --  
20 give me a little more background on the invention, the  
21 inventor, the date of the application, the patent, and sort of  
22 where that fits in the timeline of what is going on in the  
23 industry.

24 MR. BOSY: Okay. Sure. The patent application was  
25 filed in the summer of 1999, and it is based on an actual

1 reduction to practice a year before. The inventor -- there  
2 was just one -- his name is Keith Lowery. He now resides in  
3 Seattle. He will be moving back to Texas, and we would expect  
4 to call him as a witness at trial.

5 The work was done by a predecessor-in-interest to  
6 Parallel Networks using their own funds and their own research  
7 and development activities. In other words, these were not  
8 patents we went out and bought. This is our work. So --

9 THE COURT: Did Mr. Lowery work for Parallel or  
10 assign it to Parallel?

11 MR. BOSY: He did. He worked for a  
12 predecessor-in-interest of Parallel Networks and he assigned  
13 all right, title, and interest of the patent to Parallel  
14 Networks.

15 THE COURT: Who was the predecessor?

16 MR. BOSY: The predecessor was epicRealm.

17 THE COURT: When did the patent issue?

18 MR. BOSY: It issued in 2002.

19 THE COURT: Okay. And since 2002 what has been  
20 going on with either Parallel or the predecessor over the last  
21 eight years?

22 MR. BOSY: Since then the predecessor went through a  
23 number of reorganizations, financial issues there. Parallel  
24 has been involved in other patent litigation not related to  
25 this patent. And that is about it. So, you know, we bring

1 ourselves up to this date.

2 THE COURT: Okay. All right. Then tell me, if you  
3 know, from -- and you may want to defer to defendants just  
4 with regard to what their position is, I mean is this  
5 primarily -- or from your perspective what are going to be the  
6 key issues? Are we talking about it is going to turn on the  
7 constructions, Markman constructions? Are there  
8 indefiniteness issues being raised? Is there prior art that  
9 is being alleged against it? Kind of address --

10 MR. BOSY: Let me tell you what I know.

11 THE COURT: Okay.

12 MR. BOSY: We have had a lot of conversations with  
13 the defendants on various subjects, on trying to get a  
14 scheduling order before the Court.

15 THE COURT: First of all, I applaud you for even  
16 getting a scheduling order before the Court with this many  
17 defendants.

18 MR. BOSY: It was a lot of work.

19 THE COURT: That is no small task.

20 MR. BOSY: There was a lot of back and forth there.  
21 And, you know, we have just got a few little unsettled issues,  
22 but by and large they are ready to go.

23 For the most part what I am hearing is not  
24 infringement defenses. I mean, that is what I am hearing.  
25 And they seem to us to be based upon a Markman construction

1 that we wouldn't agree with it. That is the -- that is what I  
2 am understanding. I mean, I have heard that many, many times.

3 THE COURT: That noninfringement argument goes to  
4 what feature?

5 MR. BOSY: There are several that we have heard. As  
6 I said, the patent requires an applet. It requires that the  
7 server send an applet to the personal computer. And many of  
8 them are saying that they don't have applets, they don't use  
9 that.

10 It seems to us that in saying that, they are  
11 misconstruing what an applet is, I mean, in a nutshell. That  
12 is what our position is. So almost certainly one term that  
13 the Court is going to have to construe is an applet.

14 There is a requirement in the patent, as I said,  
15 that an applet be sent back to the personal computer and that  
16 also data must be sent back. In the example that I gave, the  
17 data would be the shirts; their colors, their sizes, and so  
18 forth.

19 Many defendants are saying that they don't do that,  
20 they don't perform that step. Again, it is our view that in  
21 saying that, they have misconstrued the claims. So we call it  
22 the constituent system. That's what we call it. I really  
23 have no doubt that that will be another key point in the  
24 Markman hearings.

25 There are other noninfringement arguments, but those



1 are the ones that I hear repeatedly.

2 THE COURT: Okay.

3 MR. BOSY: Okay. I haven't heard many invalidity  
4 arguments. There have been a few. We have looked at them,  
5 and we just think they don't have any merit. This is what we  
6 have. We have invalidity contentions from the defendants in  
7 111. We don't have them yet from 112, 275, or 491. They  
8 would come in later.

9 I believe the 111 defendants have presently relied  
10 on 78 prior art references. We have gone through them. Many  
11 of them can be discarded as just being completely irrelevant  
12 and not even related to the technology. We have narrowed them  
13 down to the ones that may be related, and we just don't see  
14 every element of the invention in any of those references.

15 And also the references that we have looked at and  
16 focused on, seem to teach away the obviousness issue. In  
17 other words, the technology in these references is not  
18 directed to improving efficiency in accessing a website, so we  
19 don't see that there is a good -- you know, obviousness  
20 argument there.

21 But, again, we haven't heard much on that. So to  
22 our minds the issues that we have heard are infringement.  
23 Markman would be very important for that. Perhaps,  
24 invalidity. We haven't talked much about damages. We have  
25 been awaiting the Court's ruling on bifurcation.

1           But it would be -- and I will get to this in a  
2 minute. It would be our view that we are looking at a  
3 reasonable royalty, and it would be, of course, based upon the  
4 Georgia-Pacific factors, an analysis of those. And once the  
5 reasonable royalty would be established, it would be  
6 multiplied against the revenue generated from the website.

7           So if a clothing retailer generates a certain amount  
8 of revenue from that website, that is an example, then it  
9 would be our view that the damages would be whatever the  
10 reasonable royalty rate is times the volume of goods sold on  
11 the website.

12           THE COURT: What about the entire market value rule  
13 and how that would relate?

14           MR. BOSY: The way I think about it is the entire  
15 market value rule probably wouldn't apply here. The reason  
16 is, is the infringing activity is the operation of the  
17 website. I mean, this patent doesn't cover clothes or cars or  
18 anything like that. It simply facilitates the accessing of  
19 the website.

20           So in that sense it probably doesn't make any  
21 difference whether they are selling cars or clothes or airline  
22 tickets. It just doesn't matter because they are all doing  
23 this for the identical reason; it is faster, and it is more  
24 efficient.

25           So in my conception the reasonable royalty analysis

1 would be based upon looking at the advantages that are gotten  
2 from the use of this technology at the website. And the  
3 advantages would come out with a number going through all of  
4 the factors; and then as I said, that number would apply to  
5 whatever sales they are getting. Whether it is cars or  
6 whether it is airline tickets, it just wouldn't make any  
7 difference.

8 So in that sense -- and I will get to this a little  
9 bit later too -- the damage analysis is fairly  
10 straightforward. I mean, in other words, it isn't a damages  
11 analysis that really requires a very, very detailed look into  
12 every single defendant here. And the reason for that is they  
13 are all doing this for exactly the same reason; faster, more  
14 efficient access to the website.

15 So that is how I understand the issues now, based  
16 upon what I have been told in telephone conversations and in  
17 filings with the Court. For example, Bentley filed a paper  
18 with the Court; and what they talked about is  
19 noninfringement. Yahoo! filed a paper with the Court. They  
20 too only talked about noninfringement. So that is why I am  
21 coming to the conclusion that I have.

22 THE COURT: Okay. All right.

23 Okay. Why did you elect to bring the case in this  
24 manner of suing so many defendants versus picking a few target  
25 defendants and suing them to sort of test the validity of your

1 patent and your case and establish a damage and then try to  
2 license the other defendants?

3 MR. BOSY: Yes, I can explain that. It is because  
4 perhaps of our strategy here. Due to the fact that there are  
5 so many entities infringing this patent, it was our conception  
6 that attempting to try every single one of them sequentially,  
7 did make sense from a cost viewpoint, and it doesn't make  
8 sense from the viewpoint of what our demands have been.

9 From our idea, our demands have been very reasonable  
10 and they have been based upon a fraction, a small fraction of  
11 what we believe we could acquire in a reasonable royalty  
12 analysis, damage analysis. We believe that the demands also  
13 are of interest or should be of interest to the defendant  
14 because we have structured it so that we believe that it would  
15 be substantially less than what they would need to spend to  
16 bring this case to trial, to Markman.

17 So, you know, it was our strategy not to go after  
18 one defendant and ask for \$30 million. It was our strategy to  
19 go after a lot of defendants, get those issues resolved,  
20 hopefully, by settlement. So that has been our strategy.

21 THE COURT: What's -- when you say that in your  
22 settlement strategy you have been -- sort of what is your  
23 damage model or settlement model that you are operating under  
24 as you extend these offers?

25 MR. BOSY: Yes. I mean at present, you know, we

1 would be looking at not less than a reasonable royalty in the  
2 neighborhood of two to three percent. I don't want to be  
3 bound by that, but it would be as low in our mind as it would  
4 go.

5 THE COURT: Let me stop you right there. I want to  
6 have a really frank discussion today, and I know that from the  
7 plaintiff's standpoint just as you just said, I wouldn't want  
8 to be bound to that.

9 MR. BOSY: Right.

10 THE COURT: You have not completed your analysis,  
11 you want to leave your options open. And I think from the  
12 defendants' standpoint there are lots of things you might be  
13 hesitant to say, you know, that, well, will this bind me  
14 later. So I was thinking before the hearing -- and I would  
15 just like to get everyone's idea on this, at some point in the  
16 hearing maybe just going off record with our discussion, if  
17 there was no objection to that, and we could even do that at  
18 this point or do it later. I'm really thinking of later.

19 But if there is something that I bring up that you  
20 would rather not comment on and say could we do that off the  
21 record. But before we go there, let me just ask if I elect to  
22 do that at some point during the hearing -- I am welcome to  
23 opposition to it if someone has a reason why they would not  
24 think that would be a good idea at some point to facilitate  
25 discussion -- is there anybody that would have an objection to

1 that if I decide to? Please feel free to speak up if you do.

2 MR. JONES: I don't think the defendants would, Your  
3 Honor. And I am kind of in a little bit of a box because  
4 obviously I represent five defendants. I'm speaking for more.  
5 If the Court would understand when I speak, I'm giving you my  
6 impressions --

7 THE COURT: I understand.

8 MR. JONES: -- as to where I think the defendants  
9 are, and I am not trying to bind them. I don't think the  
10 defendants would have a problem with that, Your Honor.

11 THE COURT: Either that, if y'all would just rather  
12 have an agreement that anything said here by the other parties  
13 is not going to be quoted back to them in a trial or with  
14 regard to a witness, would that be helpful?

15 MR. JONES: Subject to my brethren standing up and  
16 saying they object to that, I have no problem with that.

17 THE COURT: All right. What about  
18 plaintiff?

19 MR. BOSY: We have no problem with that.

20 THE COURT: Anybody have any problem with that?  
21 Objection to it? Speak now.

22 MR. HALLAJ: Your Honor, the comments the plaintiff  
23 made about the distinction between their invention and the  
24 prior art might be helpful; and so if you are referring to  
25 future comments --

1 THE COURT: I'm sorry, I couldn't hear you.

2 MR. HALLAJ: The comments that were made a few  
3 minutes ago about how the prior art worked and the difference  
4 between the prior art and the invention that the plaintiff is  
5 bringing, those are very helpful. And so it would, perhaps,  
6 be appreciated to be able to refer to those in papers later if  
7 there is an issue that comes up later.

8 THE COURT: You mean, like in court to say well  
9 plaintiff said at this hearing that this is the distinction  
10 they make on prior art?

11 MR. HALLAJ: Yeah, if some of those distinctions  
12 between the invention and as described between the prior  
13 art --

14 THE COURT: See, that's what I am trying to avoid --  
15 go ahead. Stay up. I'm not asking you to sit down. What is  
16 your name?

17 MR. HALLAJ: My name is Ibrahim Hallaj.

18 THE COURT: Okay. I just needed that for the  
19 record.

20 But that is what I am trying to avoid where he  
21 doesn't have to be -- where he can speak a little more  
22 candidly without being worried about somebody is going to get  
23 this transcript and put his expert on the stand and say now  
24 didn't you say on this date that -- your own attorney said  
25 this. So that is what I am trying to avoid. Are you saying

1 you would like to use that in a trial later?

2 MR. HALLAJ: I think -- I'm not insisting on it, but  
3 I am saying some of these things are informative because my  
4 client is trying to understand what the basis is --

5 THE COURT: Well, I think you are free to repeat to  
6 your client anything that is said at the hearing. I'm not  
7 saying this hearing should be closed; but I am just saying as  
8 far as using it in any of your litigation going forward, can  
9 we have that agreement that it will not be used there?

10 MR. HALLAJ: I think we are willing to do that.

11 THE COURT: Okay. Anybody else have an objection?

12 Okay. As far as that goes at this hearing feel free  
13 to speak. It is not binding on you. It is not going to be  
14 read back to you in a trial or in a Markman hearing, well, he  
15 took this position with regard to prior art or the defendants  
16 took this position with regard to their constructions. I want  
17 everybody to feel free to talk.

18 So go ahead.

19 MR. BOSY: Okay. Let me just talk a little bit  
20 about bifurcation, the history here. The way this started  
21 was --

22 THE COURT: Well, before you go to bifurcation, we  
23 were talking about your damage model and reasonable royalty,  
24 and you were saying three percent. I would like to drill a  
25 little deeper. I notice that you have settled with half a



1 dozen defendants.

2 Do you have a model that -- I'm not asking -- if you  
3 have not divulged it to these other defendants, you don't need  
4 to say right now. But do you have a model that you are using  
5 when you talk to defendants, well, based on your sales, you  
6 know, here is the lens through which we are viewing what we  
7 would be willing to settle with you for as this point, and it  
8 is related to sales? Or is it more related to cost of  
9 defense?

10 MR. BOSY: It is related to both.

11 THE COURT: Okay.

12 MR. BOSY: So where we start is that if we go to  
13 trial and win, we are going to get a reasonable royalty. Let  
14 us say it is not below two to three percent. And if you  
15 multiply that by the royalty base, which would be the sales on  
16 that website, whatever way you look at that, the number is  
17 going to be much higher than our demand. I mean, it is just  
18 way, way less than that number.

19 So if you want to take this to trial, that is your  
20 exposure, and you need to evaluate, you know, what risk there  
21 is. But we are discounting the demand in such a way to make  
22 settlement very attractive to you. I mean, that is the way  
23 our thinking has been.

24 There are some defendants who say, well, we don't  
25 sell anything on the website, so there isn't going to be

1 damages. That would be, say, a car maker. You know, they  
2 don't sell cars on the websites. But what they do do is offer  
3 their websites to potential car buyers. And if they are  
4 interested, then they download all of the information; the car  
5 they want, the wheels, how much they want to spend. And then  
6 they take it to a dealer. So that is how they are selling  
7 through that website.

8 Your Honor had a case on that. It was, I believe,  
9 Hyundai -- it was a Hyundai case. And that case showed, for  
10 example, that car makers in this particular case absolutely  
11 have to have this website; and that they have internal  
12 calculations which show what their conversion rate is, meaning  
13 the people who go to the website how many actually go to  
14 dealers and buy cars.

15 So I would expect that all these entities here that  
16 do not sell anything directly on that website have a good  
17 understanding of what they are getting out of it. So for  
18 those we have said we don't have any damages because we don't  
19 sell anything on our website, that has been my answer. You do  
20 sell things through your website.

21 THE COURT: When you say you discount your demand,  
22 can you give me a range -- let's say if you were willing to  
23 settle a case for in the 250 to \$500,000 range, what kind of  
24 damage model would you be looking at, from what to what?  
25 Would that apply to somebody with a potential through the lens

1 through which you view it would have a \$5 million exposure or  
2 a \$50 million exposure or \$200 million exposure?

3 MR. BOSY: The exposures vary entity by entity. Some, for  
4 example, Amazon, are very, very big; hundreds of millions of  
5 dollars are sold on their websites every year.

6 THE COURT: And you haven't settled with Amazon yet?

7 MR. BOSY: No, we haven't.

8 Some are less and would have probably a lesser  
9 exposure; and the one that, for example, I have in mind is JP  
10 Morgan. We know what they do and how it works. And so  
11 because that exposure is smaller, we would have a range of  
12 settlement numbers, which Your Honor knows what they are.  
13 And, you know, they probably would be toward the bottom of  
14 that range. Whereas, Amazon would be near the top of the  
15 range.

16 We have also listened to -- we have listened to  
17 everything they have told us, including all of the factors  
18 that they think are relevant, including their noninfringement  
19 arguments. But the noninfringement arguments -- and we looked  
20 at them, and they really boiled down to pretty much the same  
21 thing I told you. They don't use applets. The don't transmit  
22 data back to the personal computer. And some of them say when  
23 that information is transferred to the personal computer, you  
24 can't really operate on the data. That is kind of in a  
25 nutshell what we have heard.

1           Again, we think and we have explained that those  
2   noninfringement arguments are based upon a misreading of the  
3   claim terms that would be construed in a Markman hearing. So  
4   that, in sum, is what we have been doing. And we had a lot of  
5   settlement discussions. Your Honor knows that we have seven  
6   now; and there are, right at this point in time, quite a few  
7   in the works that we are working on. We think we are pretty  
8   close to settling, you know, at least another handful of cases  
9   pretty quickly.

10           We have, in general, had a pretty easy time --  
11   mostly -- deciding on a number. The difficulty has been  
12   frequently these defendants have different commercial issues  
13   with regard to, you know, the license agreement. And so we  
14   have spent a lot of time altering our standard license  
15   agreement to suit the needs, you know, of a defendant.

16           I mean so, for example, you know, an auto maker  
17   might want to, you know, be clear that when we enter into this  
18   license agreement that, you know, all of these automobiles  
19   will -- you know, cannot be charged with infringement,  
20   notwithstanding the fact that, you know, automobiles today  
21   might actually have personal computers in them to go to a  
22   website to get information.

23           So when that request has been made we have inserted  
24   appropriate language to satisfy them; and, you know, that is  
25   what we have been doing.

1 THE COURT: Of the 124 defendants so far you have  
2 settled with --

3 MR. BOSY: Seven.

4 THE COURT: Seven. And how many additional ones do  
5 you have extending offers out to?

6 MR. BOSY: Well, I don't have an exact number. Some  
7 of the offers have expired, but --

8 THE COURT: Or have you made offers to? I will put  
9 it that way.

10 MR. BOSY: Well, over half, well over half.

11 Let me put it this way: Our communication line has  
12 been open. We have written to every defendant and told them  
13 that, you know, if you are interested, we would like to talk.  
14 We have talked to about half of them, and I suppose it is our  
15 impression that because we never heard back from them, the  
16 other half don't want to talk right at this moment. They may  
17 be waiting for the results of further proceedings in this case  
18 as we go along.

19 In three of the cases nobody has produced documents,  
20 and in none of the cases has anybody had to identify claim  
21 terms that need to be construed. So according to the  
22 schedule, there is a lot of things going on here; and it may  
23 be the defendant wants to wait and see what happens at the  
24 next step.

25 THE COURT: Are the various defendants aware of what

1 other defendants have been offered, or is that all  
2 confidential?

3 THE COURT: They don't know what has been offered.  
4 But -- let me back up. They certainly know about the seven  
5 agreements. We have produced them. So they know that. And  
6 it is my impression that they know pretty well that that is  
7 the range, give or take a little bit, that we would take. And  
8 every time we have ever talked to them we have conveyed that.

9 THE COURT: What is that range?

10 MR. BOSY: That range is about \$200,000 to around  
11 \$500,000.

12 THE COURT: Okay. All right. And based on that  
13 range of what you would be willing to settle with the  
14 defendants on, what type of damage model range from a low to a  
15 high do you have?

16 MR. BOSY: A high would be around \$20 million a  
17 year, and a low would be something that we are not sure of  
18 because we don't have sales information. Some entities we  
19 have very clearly disclosed sales information, and some  
20 entities we don't.

21 THE COURT: The ones you have sales information,  
22 what would be your low?

23 MR. BOSY: Some of them go down pretty low, maybe  
24 \$10 million a year. That would be about \$200,000 a year.

25 THE COURT: Okay. And on someone that has a

1 \$200,000 a year damage model, are they still in that 200 to  
2 500 range as far as settlement?

3 MR. BOSY: Yes.

4 THE COURT: All right. Let's go ahead with, I  
5 guess, bifurcation.

6 MR. BOSY: Okay. Let me just touch on the history  
7 here.

8 THE COURT: Well, I tell you what, before we get to  
9 bifurcation, let me -- do you have anything else generally  
10 about the case, how we got here, what you would like to see  
11 happen as far as the case; in other words, what the plaintiff  
12 is trying to accomplish by this litigation? I guess you have  
13 answered that as to you believe your patent is very  
14 widespread, affects a lot of people, and you are willing to  
15 discount their potential damage in order to settle the case?

16 MR. BOSY: That's right. And so our goal is  
17 twofold. First, to try to settle as many defendants out under  
18 the terms that I have talked about that. That is our  
19 strategy. And for those that don't wish to settle out, we  
20 want to adhere to the Court's schedule; Markman in October and  
21 trial the following year. And no matter whether damages is  
22 bifurcated or not, we want to adhere to those schedules. We  
23 want to get this case resolved for whoever is left in it.  
24 That is our goal.

25 THE COURT: Very good. Let me hear from defendants

1 now. Thank you. I really appreciate your candid  
2 explanation.

3 Mr. Jones.

4 MR. JONES: Thank you, Your Honor. Let me try to  
5 address the same questions you just asked the plaintiff, on  
6 behalf of the defendants. And let me try to be also as candid  
7 and frank as possible; and, like I say, to my brethren when I  
8 say wrong things, just make sure the Court knows that.

9 The first thing I would tell you, you kind of asked  
10 the plaintiff what do they really want out of this litigation.  
11 On behalf of the defendants collectively, I can tell you what  
12 they want out of this litigation.

13 The defendants that are left, when I hear them talk,  
14 what I hear is they think they do not infringe these patents;  
15 and they desperately want a way cost effectively to be able to  
16 defend themselves from suits like this without being forced to  
17 a settlement based upon cost of defense.

18 Now, Your Honor knows -- while we are being frank  
19 here -- that there are a lot of suits going on today about  
20 patents that you need to be able to carry on electronic  
21 commerce. There are a lot of patents out there claiming the  
22 same things that Mr. Rosen (sic) just claimed. And these  
23 defendants are seeking a way that they can resist those  
24 patents that they legitimately do not infringe and do so in  
25 cost-effective manner because if they have to settle all of



1 those cases based on cost of defense, it does add up and it  
2 does affect the cost of doing business in a very, very real  
3 way. So that is the goal.

4 Now, how do we get to that goal? How do we  
5 accomplish that goal? The second thing I see that I will  
6 again kind of dive off Mr. Rosen's (sic) comments is I do see  
7 some agreement in this case when you do an analysis of it. He  
8 says that when he talks to the defendants, he says mainly what  
9 I see here is an infringement argument.

10 Well, that goes up to my point number one, he is  
11 hearing it right. He is hearing I guess the same thing I am  
12 hearing, Your Honor. He is hearing that these defendants  
13 collectively believe they don't infringe the patent.

14 And, in fact -- and that is what -- in preparing for  
15 this hearing today, what the defendants have tried to do is  
16 they have tried to come to the Court and decide what can we  
17 talk to the Court about collectively? What can we deal with  
18 in a macro sense because it applies to all of us and let's try  
19 to do that first and narrow the issues in this case and then  
20 hold off those things that are specific to various defendants  
21 that we have to deal with in a nonefficient fashion.

22 So when we looked at it and when we tried to come up  
23 with what can we deal with collectively, it is this issue of  
24 noninfringement that we agree with the plaintiffs kind of  
25 overrides all of the defendants in this case.

1           Now, Your Honor asked me when we first started,  
2   about the joint defense group. I'm not going to presume that  
3   I can read your mind. But what I assume you were interested  
4   in because I have been in other cases in your court where the  
5   defendants, we can kind of break them out into groups; we had  
6   suppliers or we had manufacturers, we had shipmakers, you  
7   know, we had various different things, and can there be  
8   groupings like this.

9           Your Honor, I don't believe this case is one of  
10   those cases where we break down into groups like that. It  
11   doesn't seem to work that way. We have done an analysis to  
12   see, you know, looking at the infringement contentions, how do  
13   we group the defendants? And what we have found, I believe,  
14   is that is not very helpful in this particular case.

15           Now, if you want to go into the details of the  
16   analysis, I am going to punt to Mr. Gary Sorden. Thompson  
17   Knight has done this work. But what they have found is  
18   basically there are only two different categories. Some of  
19   our systems are based upon JavaScript.

20           THE COURT: Based on what?

21           MR. JONES: JavaScript.

22           THE COURT: Okay.

23           MR. JONES: That is about 98 percent of the systems.  
24   That's why it doesn't give us very much help. The others are  
25   Flash systems. And you know my technical deficiency, so I

1 will punt to him if we have got to go any further in that.

2 THE COURT: That's far enough.

3 MR. JONES: But what we see there is that doesn't  
4 help us a lot. But what we do find when we look at things  
5 collectively, is that there are two, maybe three -- I can get  
6 the group committed to three, so I am going to go with three.  
7 I tried to hammer them down to two, but I couldn't do it. But  
8 there are basically three infringement arguments that go  
9 across the group collectively.

10 That principle also helps you, I believe, in claim  
11 construction because if we don't -- again, if we stay at this  
12 macro level, if we stay at the collective level, I have also  
13 got agreement out of the defendants that would limit you to  
14 construing three or less terms. Again, I went for two. I  
15 have gotten them to agree to three or less.

16 So if we stay at that collective level there trying  
17 to see if we can efficiently dispose of all of these  
18 defendants, we can limit ourselves to three grounds of  
19 noninfringement, to construing three terms by this Court.

20 And we would suggest to the Court that if you  
21 continue to follow that path, the most efficient way to tee  
22 this up is to allow the defendants to make a motion for  
23 summary judgment on those grounds, limited to three grounds  
24 and collectively as to all of the defendants; that the terms  
25 that you would need to construe with regard to those three

1 grounds of noninfringement would only be three or fewer  
2 terms.

3 At that point -- and, again, we want to be free --  
4 we want to be fair to the plaintiffs. It might be hard for  
5 the plaintiffs to say what discovery they are going to need  
6 until they see the motion. So our proposal would be that we  
7 file our motion, let them see that motion, and then give them  
8 an opportunity to provide, okay, we need this in order to  
9 refute this motion certain discovery.

10 And, hopefully, we could agree upon that, that the  
11 parties could agree upon that. In good faith I believe we  
12 could. If we can, if there is something about scope that we  
13 are going to get in a fight into, the Court can resolve it  
14 very quickly to then allow the plaintiff to do that discovery  
15 so they can respond to our motion and then present those  
16 issues to the Court.

17 Now, what is going to happen? I think generally  
18 what is going to happen is the Court is either going to decide  
19 that that motion is good; that the defendants' collective  
20 belief was correct, we did what we were talking about and you  
21 can dispose of the case efficiently.

22 If we are wrong, the plaintiff will be given the  
23 opportunity to show the Court we are wrong. But the plaintiff  
24 will also probably most likely say, well, there are certain  
25 fact issues here and we are going to zero in on the fact

1 issues that really count with regard to noninfringement. And  
2 at that point the Court could tailor-make a trial that just  
3 dealt with the fact issues that are really important that deal  
4 with the commonality of these subjects.

5 Now, that is the analysis that we have done when we  
6 have tried to bring order to this process and efficiencies to  
7 this process.

8 THE COURT: Let me stop and ask you a couple of  
9 questions.

10 MR. JONES: Certainly.

11 THE COURT: One, when you say three noninfringement  
12 issues, three terms, if plaintiff loses on their -- I mean if  
13 defendants lose on their motion for summary judgment of  
14 noninfringement, are you going to want to come back and have  
15 another Markman with more terms, or is that it?

16 MR. JONES: That is where I don't have the agreement  
17 of defendants. I will be really open with the Court about  
18 that. I mean, the defendants have these common issues, which  
19 I am suggesting the Court deal with first in this case.

20 Now, getting all of the defendants to then agree we  
21 are going to give up all our specific issues, I do not have  
22 that agreement. Even on my clients I don't know if they are  
23 ready to agree to that.

24 So what is the advantage? To me the advantage of it  
25 is, it is kind of like a bellwether case. It gets us to the

1 place where people then have the knowledge they need to make  
2 the decisions to either proceed with the case or make the  
3 decisions to settle the case.

4 Let me go at it a different way? I am trying to  
5 come up with a proposal where the defendants aren't forced to  
6 settle due to cost of defense. But if we lose at that point  
7 and we are into the category of we have got to get into the  
8 specifics --

9 THE COURT: Say that again. I missed that.

10 MR. JONES: I am trying to deal with the issue of  
11 allowing the defendants to evaluate this case and make a  
12 determination upon it not to be driven by cost of defense. If  
13 we lose the motion for summary judgment, then at that point --  
14 and if we are to the point where we have to rely upon specific  
15 issues, then I think cost of defense may well drive the  
16 business decisions that are made. That is the point that I  
17 think the Court would be enabling or structuring the case so  
18 that that does not occur before the collective issues that can  
19 be handled efficiently are addressed.

20 THE COURT: Well, I guess -- I always struggle with  
21 motions for summary judgment because I think very often it is  
22 an effort to, you know, get a bite at going home without  
23 having anything at risk. And I think risk is what resolves  
24 cases.

25 But -- and I will also say noninfringement motions

1 for summary judgment, I don't think I have granted very many  
2 of those. And the reason is they are usually so fact  
3 intensive that they are difficult, extremely difficult and I  
4 am often reluctant to pour somebody out until they have had a  
5 chance to really explore it and I hear the testimony in court  
6 from experts and there is an opportunity to cross-examine.  
7 And I may JMOL it at that point, but I have a much greater  
8 level of confidence than I do just from a paper-type motion  
9 for summary judgment.

10 So is this -- what you are envisioning this  
11 noninfringement summary judgment, is this a discrete enough  
12 issue, are each of these issues that you really think can be  
13 teed up, or is it just going to devolve into a morass of  
14 factual arguments and minutia that it is going to be difficult  
15 for the Court to determine, and plaintiff comes in and argues  
16 doctrine of equivalents and we are right back to where we  
17 could have been if we hadn't even done this exercise.

18 MR. JONES: I believe they are discrete enough, Your  
19 Honor. One of the reasons it gives me encouragement as I  
20 listen to Mr. Rosen (sic) talk about applets, and we are on  
21 the same page.

22 THE COURT: What are the three issues?

23 MR. JONES: I know two of them.

24 THE COURT: Well, no wonder you couldn't talk them  
25 into giving up the third one if you don't even know what it

1 is.

2 MR. JONES: The problem is, Your Honor, that I  
3 don't know -- since we are being open here, let's be open. I  
4 think we know two of them that everybody agrees on; and that  
5 the third one is more of a back-stop because I don't know it  
6 has been enunciated or agreed upon.

7 THE COURT: What are the two?

8 MR. JONES: I think they have been enunciated. The  
9 applet issue and also don't trans. back, back to the personal  
10 computer.

11 And, Matt, if you want to help me.

12 MR. MOORE: Your Honor, as I understand this, I  
13 first want to go to the phrase that relates to an applet being  
14 dynamically demonstrated in response to a request. Part of  
15 why you had two versus three is that phrase makes it a  
16 portion. And part of it is the dynamically-generated portion  
17 of it.

18 The other part of it is the request. At first it  
19 was "a" request and then throughout the claim it refers to  
20 "the" request, antecedent basis going back to the same  
21 request. It has to be a single request. So those are two  
22 that most of the defendants are in agreement on.

23 MR. DAVIDSON: Dan Davidson for Yahoo!, Your Honor.  
24 We had filed a pleading with the Court earlier that I think  
25 set out two of issues, the single data request and executable



1 applet. We think that given the plaintiff's preliminary  
2 infringement contentions, that the Court could construe those  
3 terms and we wouldn't need discovery. Just like the Court had  
4 done in the Joao Bock Transaction case.

5 Basically took the infringement contentions, there  
6 was a construction, and there was no discovery. Granted  
7 that -- and the Court ruled at summary judgment. Granted that  
8 case dealt with invalidity issues and this deals with  
9 infringement issues, but again --

10 THE COURT: I will say in that case there had  
11 already been a New York court where the jury had found that  
12 patent invalid.

13 MR. DAVIDSON: Correct. But the issue there is  
14 taking the plaintiff's infringement contentions here is true.  
15 With certain constructions by the Court we think summary  
16 judgment could be appropriate and there wouldn't even be the  
17 need for discovery at that point, which is what we had set  
18 forth in our brief, and I think Victoria Secret had joined in  
19 as well.

20 THE COURT: Go ahead, Mr. Jones.

21 MR. JONES: I will be frank with Your Honor. I  
22 think the other thing we are talking about that is a little  
23 unusual would be to try to identify what those common fact  
24 issues are through this process. The Court might well  
25 conclude at the end of the process that, well, these are two

1 big issues here. Other than this, it is a question of law.  
2 You know, we could probably then formulate a very narrow trial  
3 on those issues.

4 Now, and again being open, we have analyzed other  
5 ways to do this, and this very Court has done other things.  
6 One of the things we analyzed was, okay, well, is there a  
7 bellwether defendant or defendants that want to go first and  
8 want to raise their hands? And get something like that done.

9 THE COURT: Was there?

10 MR. JONES: The answer to that question is a little  
11 bit equivocal. If the Court tells us that is what you want to  
12 do, Your Honor, and you give us that guidance, I think we can  
13 come up with some. If you give us two weeks or something. I  
14 mean, there are some issues that, frankly, have to be  
15 negotiated out.

16 But to be totally candid with the Court, that is my  
17 answer to you. I think there is more efficiencies with the  
18 process that I suggested to you first. But we don't have that  
19 specific person named at this point in time or persons; but if  
20 you told us that is what the Court prefers, I think you would  
21 get there.

22 We looked at the issue of, you know, maybe if we  
23 took some of these smaller cases and just got people to agree  
24 to bench trials for cases less than a million dollars, that  
25 that might bring efficiencies to the process.

1           Again, I think you are going to find there are some  
2   defendants interested in that and some that are not, but that  
3   is another thing --

4           THE COURT:   What, just trying it on damages or  
5   trying it on all issues?

6           MR. JONES:   Trying it on all issues as a bench  
7   trial.

8           THE COURT:   I don't like that idea.

9           MR. JONES:   Your Honor, I'm trying to --

10          THE COURT:   I could see myself trying 50,  
11   less-than-a-million-dollar cases for a week each, and that is  
12   not appealing at all.

13          MR. JONES:   I understand.   We looked at that.

14          And there is another thing we looked at and you are  
15   not going to like this one much better, so maybe I ought to  
16   just shut up.

17          THE COURT:   No, go ahead.

18          MR. JONES:   We also looked at -- the Court is very  
19   familiar with the ResQNet and Uniloc decisions and going,  
20   okay, is there any way we can make some kind of motion to put  
21   a limit on damages based upon that.   And some courts across  
22   the country are doing that, but that was another idea we  
23   looked at.

24          What we try to do is find out where is there  
25   commonality?   Where can we get away from trying 140 different

1 cases because we thought the Court was trying to do that.

2 Those are the best ideas we can come up with. It is  
3 not that we haven't brainstormed.

4 Now, let me address the invalidity issue because I  
5 do think at that point in time Mr. Potsy (sic) and I have a  
6 little disagreement on what we are saying. I know there is 79  
7 pieces of prior art that have been cited so far. Judge, you  
8 have got over 50 great law firms here. You know, if it is one  
9 per defendant it is going to be a lot of prior art.

10 The prior art, the one thing to deal with that makes  
11 it in this particular case become an individual matter, is  
12 many defendants have their own prior art that they are relying  
13 upon. The Court is certainly aware that if you have your own  
14 prior art, that is ten times better at trial than if you have  
15 somebody else's prior art you rely upon. So it makes  
16 invalidity in this case not near have the commonality features  
17 that infringement does.

18 Also, with regard to the issue of bifurcation that  
19 has been brought up, let me speak for the group as a whole.  
20 If you want to have the dissenting opinions, certainly we are  
21 prepared to address those.

22 THE COURT: Well, before we get to -- are you  
23 talking about bifurcation of damages and liability?

24 MR. JONES: Yes.

25 THE COURT: I haven't given plaintiff an opportunity

1 to speak to that.

2 MR. JONES: Excuse me.

3 THE COURT: So I will let them do that, and then I  
4 will let you respond.

5 MR. JONES: Thank you, Your Honor.

6 And then finally the other issue that I wrote down  
7 that I wanted to address that he raised is Markman. I think  
8 if we could bifurcate the Markman process to collective terms.  
9 You know, when you talk to everybody in the room, we have had  
10 various conference calls and even a general meeting on this,  
11 there are a whole a lot of terms that these individual  
12 defendants would want to ask be construed based upon  
13 individual defenses and individual prior art that people want  
14 to assert.

15 Collectively, if you say, okay, collectively what  
16 could we go with, we could get it down to two or three terms.  
17 So that kind of deals with that issue. I guess by way of  
18 generalities, those are our comments, Your Honor.

19 THE COURT: Okay. Thank you.

20 Response from plaintiff?

21 MR. BOSY: Yes. Let me start with what I just  
22 heard, and it is not really much different from what I  
23 gathered from filings with the Court.

24 THE COURT: Do you want to go to the podium.

25 MR. BOSY: So what I am hearing here is they want to

1 file a summary judgment motion. Some say there should be  
2 discovery, some say their shouldn't. And if they win that,  
3 then obviously they have won the case. But the problem with  
4 it is, is it is piecemeal and wasteful, because what you have  
5 also heard is that if they lose that, they want to go to  
6 another Markman hearing while we just heard that they have  
7 many new claim terms to construe.

8 And we finally heard that we haven't seen the end of  
9 the prior art references, so if they lose that summary  
10 judgment hearing, then we are back to Markman, we are back to  
11 lots of terms on Markman. I have a feeling that similar terms  
12 are going to come in again, and then we have to go forward  
13 with everything we need to do to understand what their  
14 invalidity contentions are. So that is very piecemeal and  
15 wasteful.

16 Now, if they want to say we are so sure of these  
17 three terms -- although actually I kind of heard five or six.  
18 But if they want to say we are so sure that we will win on  
19 these three terms that we are willing to go on it or lose on  
20 it, no further Markman hearings, no further invalidity  
21 hearings. And if that is what they want to do, I am all  
22 ears. And if they want to file a summary judgment and if it  
23 says that, then I think it is a good idea.

24 But if it says, no, if we lose we want to start the  
25 process all over again; we lose our Markman hearing date; we

1 lose our trial date because we wouldn't have been conducting  
2 discovery or doing the things we need to do.

3 So my goal is to stick to the Markman hearing, have  
4 one; to stick to the trial; and to stick to the summary  
5 judgment proceedings.

6 So this is what I have heard from them, and it is  
7 always kind of this vague thing like we are going to assert  
8 three claims, but then if we lose we want to start the whole  
9 thing all over again. And, of course, we have invalidity  
10 contentions, and we don't even know what the references are.  
11 We know there is 79, but I think we have heard there is more  
12 to come.

13 So to my feeling it is not efficient what they want  
14 to do. So if they want to file a motion that says this is it,  
15 these are our defenses and there are no others, then that is a  
16 good idea. But if it is a piecemeal thing, it is not a good  
17 idea.

18 The selection of a bellwether defendant, again, you  
19 know I am all ears on that one. But I do have the feeling  
20 that they are going to go through their case and find the  
21 defendant, the very best defendant that has the very best  
22 noninfringement arguments. And they are slightly different.  
23 We are going to go through and want the bellwether to be the  
24 one that has a knockout for us. So I don't think anything is  
25 going to come of that, but I am certainly happy to talk with

1     them and hear what they have to say.

2                   On bifurcation, you know, we proposed this to the  
3     111 defendants, and the 111 defendants all agreed it was a  
4     good idea.

5                   THE COURT: Before you get to the bifurcation issue,  
6     let me get a little response from Mr. Jones to what you said.

7                   Mr. Jones, is Mr. Bosy correct that with regard to  
8     pursuing an early Markman on a -- limited to three terms and  
9     noninfringement motions based on that in conjunction with  
10    that, that you are willing to put all your eggs in that basket  
11    or you would want the second bite with regard to other terms,  
12    other Markmans, other infringement motions -- noninfringement  
13    motions.

14                  MR. JONES: I know I can't be quoted on this, but  
15    let me tell you I am going to give you my impressions. Can I  
16    move off from talking as a representative of the defendants  
17    and move to my impressions?

18                  THE COURT: All right.

19                  MR. JONES: And this is Mike Jones's impressions.  
20    Mike Jones's impressions are, Your Honor, that, you know,  
21    there is going to have to be a reasonable limit on the claim  
22    terms you construe in this case. There has to be.

23                  THE COURT: There will be.

24                  MR. JONES: Yeah. That is true. It matters on  
25    other areas in this case, too. So my idea is this: Mike



1 Jones's impression is I am certainly going to tell my clients,  
2 look, let's get down to what really, really matters; and if  
3 there are three claim terms that are most important, I am  
4 going to encourage them unless they have something  
5 individually that is really off the wall, that we stick with  
6 just the three claim terms for claim construction.

7 I would be surprised if most of the defendants  
8 weren't really minimalistic in the claim terms that they  
9 wanted you to do. I think there are a few defendants out  
10 there, my impression is, that think they have very individual  
11 defenses that they would want to save the right to come back  
12 with some others. That is what I think you are going to  
13 hear.

14 If the Court puts people to, you know, well, I will  
15 do this plan but you are going to have to limit it to three  
16 and not have another Markman, it is probably a close issue how  
17 that comes out.

18 I would also say this about efficiencies: There is  
19 no way we can try this case as it is currently structured, I  
20 don't think. Maybe I am wrong. I guess I shouldn't have said  
21 that. The Judge will make that decision. I will do whatever  
22 you tell me to do. But we are not going to have 149  
23 defendants or 100 defendants in one trial.

24 I always try to look at these things, you know how  
25 are we ultimately going to try it and then you can figure out

1 a discovery process and a case management process that makes  
2 sense. Right now I don't have a clue. There is not that  
3 grouping that we see in other cases.

4 So to me the inefficiencies that were being  
5 complained about with regard to this summary judgment process  
6 has been caused by the fact that these -- it has been filed  
7 the way it has been filed. We know to try it, we are going to  
8 have to break it down some day. That has to happen.

9 Now, my encouragement to the Court is, well, let's  
10 break it down with the way we do our case management and bring  
11 efficiencies to the process for the breaking down that we know  
12 inherently is going to have to occur in this particular case.

13 The first thing I was suggesting was let's deal with  
14 common issues first. And with regard to the trial of the  
15 common issues, if we decide to have a common issue trial on  
16 what the material facts are, I think if the Court moved  
17 forward with that, we would all have to be bound by what  
18 happened to those common issues. I think that has to occur,  
19 and I do think it brings efficiency to the process.

20 The thing that I don't think you are going to see  
21 the defendants want to do, because there are some that have  
22 separate individual defenses that they want to keep and they  
23 want to make, I don't think -- Mike Jones's impression is you  
24 are never going to get all of the defendants to say they are  
25 going to give all those up; that they do have those and they

1 can't give those up. But we do bring some efficiencies to the  
2 process by dealing with collective issues first.

3 THE COURT: Yes.

4 MR. SOBEL: Your Honor, at the risk out on a limb --

5 THE COURT: State your name.

6 MR. SOBEL: Jonathan Sobel from \*\*Sobel & Keller.

7 THE COURT: If you can go to the podium so the Court  
8 Reporter can hear you.

9 MR. SOBEL: Yes. I kind of wish someone else would  
10 stand up and possibly make the point I'm about to make, but  
11 we'll see. I'm not the most knowledgeable in this room about  
12 the technology. But I feel as I am sitting here that perhaps  
13 there could be a little more context to what this patent is  
14 about to give some context to why an early summary judgment  
15 motion would not be very fact intensive, would not need to  
16 necessarily go even beyond the infringement contentions, and  
17 would not create a situation where it would be unreasonable  
18 for the rest of the case to go on as usual after the initial  
19 summary judgment motion.

20 This is one of those cases where if you look just at  
21 the infringement contentions, most -- the bulk of the  
22 defendants are out if a few claim terms are construed a  
23 particular way and what would be required in terms of facts  
24 and the fact intensiveness to do that.

25 These -- to back up, Mr. Bosy gave -- well, not to

1 be critical -- an overly simplistic view of this patent.

2 And with apologies to everybody if I get this wrong  
3 as well.

4 The patent had its day. The invention had its day.

5 And, perhaps, Your Honor was quizzical as to why you have an  
6 invention from the year 1999 and now you are suing in 2010 and  
7 it was issued in 2002, why did you wait eight years?

8 This invention had a time, had its day. And that  
9 day, you can remember back when you first had a PalmPilot, and  
10 they were called PalmPilots and they had very little memory.  
11 And then with over the Internet was not what it is today.

12 So it was important back then that when a client  
13 device, a handheld device -- you can call it a PDA or a  
14 PalmPilot or a phone or a computer; but that device that is  
15 calling up the server, it was important that there be less  
16 back-and-forth to get the information you wanted.

17 So what the patent said and during the prosecution  
18 the patentee said was I'm going to do it in one  
19 transmission -- it is like Name That Tune -- I'm going to do  
20 it in one transmission.

21 You are going to have a request from a client  
22 device. Let's say I want to buy shirts. I'll use Mr. Bosy's  
23 example. I want to buy shirts. In response to that request,  
24 the server has to send back two things, has to send back, we  
25 will call it functionality and we will call it data. The data

1 is the data you want about the shirts. The functionality is  
2 that applet or whatever, some computers -- some functionality  
3 that allows the client device to review and act upon that  
4 data. So there was one request and one transmission back of  
5 both the functionality and the data.

6 Now, the patent talks about a dynamically generated  
7 applet in response to a request. In that context what happens  
8 is a request and that Applet, whatever an Applet is, has to be  
9 generated on the fly. That is what the inventor used in his  
10 invention document. We are going to generate on the fly a  
11 brand new applet. That applet is going to be sent back. With  
12 that applet -- preloaded in the applet is going to be some  
13 data as well. One shot. One shot.

14 It turns out these days -- and, again, I am not the  
15 tech guy in the room; but it turns out these days most of  
16 these back-and-forth Internet systems use what they call a  
17 cascading function, a multiple back and forth.

18 Okay. So you make a request, you get back  
19 something, you look at -- the client device looks at it, goes  
20 back and requests the data. Maybe goes back and requests some  
21 more data. Because these days the client devices have a lot  
22 more memory power. The bandwidth is a lot greater, and there  
23 is no longer a need on the one hand and there is just the  
24 reality is it is not done this way, to have everything come  
25 back dynamically generated after each request and/or to have

1 it come back -- "it" being the functionality and data -- come  
2 back in response one time -- sorry, together in response to a  
3 single request.

4 What is my point? The point is, if you look at  
5 their infringement contentions, they highlight what they think  
6 the dynamically generated applet is. And in many respects and  
7 from many defendants, it is this JavaScript. And they  
8 highlight the data elements.

9 And you can see very easily apparently in most all  
10 of the defendants' websites, whether -- what the flow of  
11 information is. What is the flow of requests? What is the  
12 flow from the initial request? What is the flow back? Is  
13 there a second request? Is there a third back? You can see  
14 that, without taking a whole lot of discovery. Sorry. You  
15 could potentially see that without any discovery.

16 So this is not a case where we are going to have all  
17 sorts of fact issues and the defendants are getting a second  
18 bite at the apple and then we are litigating again.

19 The other unrelated point I want to make is this --  
20 I just can't help but feel this way: They have sued 120  
21 defendants. From their perspective what is the big deal in  
22 having these issues -- or what is unfair, rather, about having  
23 these narrow issues addressed at the start and if they feel so  
24 strongly and they want to haul 120 defendants in here, my  
25 clients shouldn't be with all these defendants.

1           We have no common transaction and occurrence. We  
2    shouldn't be with them, frankly. But we are here. So they  
3    should have to do it at least -- so what is the big deal if  
4    they have to do two Markman's now? The Court with all due --  
5    I acknowledge that there is two Markman's potentially for the  
6    Court to have.

7           But, you know, this is not -- speaking for my own  
8    client -- this is not a case where there are 50 claim terms.  
9    Even if you took all of the defendants together, I'm going to  
10   go out on a limb and say this is -- that whether there is a  
11   second Markman and people want to reserve their rights, to put  
12   it in context there is a general consensus among the  
13   defendants there are this narrow set of terms that we will  
14   agree -- among so many different defendants will agree to  
15   narrow it to three. Have it all done just like that.

16           THE COURT: Okay. Thank you.

17           MR. SOBEL: Thank you, Your Honor.

18           THE COURT: Mr. Jones, what about the second issue  
19   that Mr. Bosy had raised about the going with the bellwether  
20   defendant; that defendants would pick their best  
21   noninfringement defendants. He said he would be interested in  
22   talking with you about that I think.

23           MR. JONES: Yeah, I think the key there is finding  
24   somebody willing to do it, Your Honor. I mean, again, being  
25   totally open, you know, and knowing this can't be used, I will

1 just tell you, we are dealing with a defense group, nobody  
2 want to do something like that. There are very few, as you  
3 and I know, Intels in the world that say we want to go first.

4 What drives that is almost the corporate culture and  
5 a defendant that has the confidence that they want to, you  
6 know, stand up for the industry and take the lead. I think  
7 that is going to be much more of a driving fact on who we can  
8 get to do that than evaluating the strategic aspects of the  
9 case. So I guess that is my response to that.

10 THE COURT: Okay.

11 MR. JONES: Obviously, I think those considerations  
12 we have made -- if I can comment, I may have misspoken, I have  
13 a note here. You know, our proposal is that when we try the  
14 common issues, if we did our proposal, those issues are dead,  
15 they are gone. Now, individual defendants would reserve their  
16 individual issues. But our proposal is that you only do the  
17 common issues once.

18 THE COURT: Are you talking about common issues of  
19 fact?

20 MR. JONES: Right, common issues of fact. When we  
21 make the common motion for summary judgment, if you were to  
22 decide there is a material fact issue here we need to decide,  
23 we need to have a trial on and that is what is going to decide  
24 this case with regard to infringement, that then if you did  
25 that common trial, that certainly would decide that issue for



1 everybody.

2 THE COURT: Okay. So if there is a fact issue, then  
3 we are having a common trial on that fact issue that would be  
4 binding with a jury and everything?

5 MR. JONES: Exactly.

6 THE COURT: That would be binding on all of the  
7 defendants?

8 MR. JONES: With regard to the common fact.

9 THE COURT: Once that got resolved, we would still  
10 be looking at Markmans and discovery and damages and  
11 individual infringement issues and invalidity issues.

12 MR. JONES: Right. But what I would encourage the  
13 Court to think about is I think you then have given defendants  
14 who have been sued in a forum like this, an opportunity to  
15 present the common defenses in a cost-efficient fashion, so  
16 that at least with regard to those common issues, that they  
17 have been able to present those, have their day in court  
18 without being forced to settlement based on cost of defense  
19 and what ultimately is going to occur in the case.

20 I think that is a huge benefit. I think when the  
21 plaintiffs --

22 THE COURT: What does that do for the plaintiff  
23 though?

24 MR. JONES: Well, the plaintiff gets to have the  
25 benefit of suing 149 people all at once, which is a tremendous

1 efficiency to the plaintiff.

2 To the defense and to the defense group, you know,  
3 Judge, you just don't know how many hours it takes for me to  
4 make the limited agreements I just made to you on behalf of  
5 all these folks.

6 THE COURT: Are you going to go into mediation as  
7 your next career?

8 MR. JONES: We talked for hours, we talked for hours  
9 about claim terms. You know, you sit -- you don't want to  
10 hear about it. Let me tell you, the inefficiencies that are  
11 brought to the judicial system by suing this many defendants  
12 at once, the burden that is placed on the defendants are  
13 immense.

14 There are tremendous efficiencies to the plaintiff.  
15 All I am trying to do is suggest a way to bring some  
16 efficiency to the defendants, which I think is only fair.

17 The other thing that I would like to address is the  
18 Markman issue. Now, at least for a significant number of  
19 defendants it has been whispered in my ear that if the  
20 plaintiff would limit themselves to, say, three claims, that  
21 it may well be that defendants can limit themselves to three  
22 claim terms for the whole case. So limiting the claims might  
23 bring order to that process also.

24 Thank you, Your Honor.

25 MR. BOSY: Your Honor, if I might briefly respond.

1 You asked a question are you willing to put all your eggs in  
2 one basket? And I think in the last 15 minutes we have heard  
3 the answer to that. The answer is, no, they are not willing  
4 to do that.

5 THE COURT: Let me ask you this: If you are willing  
6 to put so many eggs in the basket, are you willing to tee up  
7 this issue that is obviously of great importance to them that  
8 they are saying in their belief it will make the case go away?  
9 Your belief is it won't, that there is then going to have to  
10 be inefficiency to it. I would take it if you prevailed on  
11 that, the value of your case might well go up, might it not?

12 MR. BOSY: Well, that's I suppose not what we are  
13 hearing. They are saying that they have got these good  
14 noninfringement arguments. If there are fact issues there, we  
15 have a trial on that, you would have to construe those claim  
16 terms?

17 Then they are saying but if we lose on that, we have  
18 got a whole bunch of other defenses. We have got other  
19 noninfringement defenses. We have other claim terms we would  
20 want construed in our favor, and then we move on to  
21 invalidity. They would want to argue invalidity. So in a way  
22 we are adding another complexity to the case by doing this.

23 Now, if they want to put all of their eggs in one  
24 basket, we are certainly willing to look at and reduce the  
25 number of claims in this case. It has always been our

1 intention.

2 THE COURT: Can you reduce your number of claims to  
3 three if they will agree there is only going to be three claim  
4 terms.

5 MR. BOSY: Let me go back and look at that. I can  
6 certainly reduce the number of claims. I do need to see what  
7 the issues are, but I can reduce them substantially. Again,  
8 it has always been our intention to do that. We have got 15  
9 claims here now. It is not my intention to go to trial on 15  
10 claims.

11 THE COURT: Okay. We are going to break for lunch  
12 here in a minute, and let me encourage you to look at that.  
13 And then when we come back from lunch, tell me whether you can  
14 make that agreement or not.

15 MR. BOSY: All right.

16 THE COURT: Did you have anything else to respond to  
17 that has just been said?

18 MR. BOSY: Yes. And let me just respond to this  
19 contention that a good noninfringement argument is that the  
20 accused devices provide more than one transmission to the  
21 personal computer. And because they provide more than one  
22 transmission, the argument now is that doesn't infringe.

23 Let me just read a little bit from the patent.  
24 First of all, the word "one" is not in any claim. Here is  
25 what the patent says: By transmitting the appropriate data

1 and associated data handling capabilities as a group, the  
2 client may be required to communicate over a low-speed  
3 communications link a greatly reduced number of times or in  
4 some cases, only once. That is Column 3, Lines 13 to 17.

5 So what that says is, sure, the transmission could  
6 be one, and sometimes that is what you want; but it could also  
7 be multiple transmissions. So the idea it could only be one,  
8 they are just reading a limitation into the claim. And we all  
9 know you can't do that.

10 THE COURT: I appreciate that. We will save all  
11 that for Markman.

12 Let me -- I would like to go on here for a few  
13 minutes. One thought that I had had prior to this hearing,  
14 and I am just going to throw it out there as food for thought,  
15 and I had the same question --

16 And perhaps you answered it, Mr. Jones.

17 And, Mr. Bosy, you may want to respond to it.

18 Let me run through my scenario. Can these  
19 defendants be grouped, and perhaps allowing plaintiff to group  
20 them into three or four groups, some manageable group based  
21 upon functionality of accused products or something of that  
22 nature? But I heard Mr. Jones saying it is really not going  
23 to be that helpful. Do you agree with that?

24 MR. BOSY: Yes, I do. The reason that I agree with  
25 that is what the defendants themselves have said. For

1 example, if you have got, say, a group of retailers there  
2 really isn't any reason to believe that that group would have  
3 a common interest as distinguished between say automobile  
4 companies or airlines.

5           They each seem to -- well, they try to differentiate  
6 themselves from one another. So I don't believe, as they  
7 themselves have said, that grouping by defendants would really  
8 be very helpful. That is what we have always thought because,  
9 you know, we have looked at this. We have looked at their  
10 websites. I mean, as our preliminary contentions --  
11 infringement contentions are some thousands of pages long with  
12 exhibits and all sorts of detailed information. You know, we  
13 have done this work, and we just couldn't see how grouping by  
14 defendants is going to help us.

15           THE COURT: The next thought I had, and I have done  
16 this in some other cases, would be if we did group them or we  
17 didn't group them, then allowing the plaintiff to choose three  
18 or four bellwether defendants it wished to go against and  
19 simply staying everything as to every other defendant.

20           MR. BOSY: That would certainly be of appeal to us.  
21 That is to say, if we could choose three or four defendants  
22 that we want to go against. And if we won, everybody else  
23 would be bound by that, that is certainly very appealing.

24           THE COURT: Well, I'm not --

25           [Laughter]

1           THE COURT: -- I don't think I said that last part  
2   they would be bound by that. I am speaking in terms of -- it  
3   has been my experience when I have done this that if plaintiff  
4   chooses wisely in what defendants that are representative and  
5   have substantial risk, that they are going to have the  
6   resources to put up a substantial fight, that usually if  
7   plaintiff prevails on those cases, that the others will be  
8   inclined to settle and resolve the case, but not necessarily  
9   they would be bound by it.

10           In other words, I guess what I am saying is, under  
11   that scenario I would think if you prevailed against some  
12   bellwether defendants, that the price of poker has just gone  
13   up; and your licensing strategy may have more value to it than  
14   it does now.

15           MR. BOSY: It may have that effect. It may have the  
16   effect, on the other hand, of allowing the other 122  
17   defendants to dig in and look up -- come up with new defenses.

18           THE COURT: Oh, yeah.

19           MR. BOSY: New noninfringement defenses, new  
20   invalidity arguments. I mean we have already got 78 prior art  
21   references, and I think we know more are coming in.

22           We have also heard from the defendants that they  
23   have, you know, a very personalized view of what -- perhaps  
24   what the best prior art defense is. So whatever we do with  
25   four bellwether defenses, there is going to be -- cases, there

1 is going to be a lot of new arguments coming up. And I know  
2 that lots of defendants have quite a strong disagreement on  
3 what prior art is.

4 If four defendants put in what they think the best  
5 prior art is, then what we are going to hear and what I have  
6 heard is, well, they used the wrong prior art defenses, we  
7 have got better ones, so this doesn't mean anything to us.

8 THE COURT: Okay.

9 MR. JONES: Can I give you a reaction to that, Your  
10 Honor? And first I need to do apologize to Mr. Bosy. I  
11 called him Mr. Rosen to start out with. I apologize. I was  
12 at my hearing last week, so I was brain dead and I apologize.

13 THE COURT: We all have those mind lapses.

14 MR. JONES: But having said that --

15 THE COURT: I noticed on the Academy Awards the  
16 actor that couldn't remember his wife's name when he was  
17 thanking her. "My lovely wife..." and then he couldn't think  
18 of her name.

19 MR. JONES: Your Honor, my wife's name is Pam.

20 [Laughter]

21 MR. JONES: If everybody can remember I knew that.

22 You know, I really -- and, again, I'm being open --  
23 I don't think that is going to be very helpful in this case.  
24 I can agree with you. I think basically you would have a lot  
25 of defendants that say we're stayed, we're on the sidelines,



1 we don't even want to talk anymore.

2 I think the other issue you have is, you know, you  
3 have a lot of different law firms involved. They are all  
4 going to think we can do better than those guys did. You  
5 know, that is going to be a reality. Particularly, if the  
6 plaintiff chooses. I mean, if the plaintiff chooses there is  
7 going to be a whole a lot of criticism with the bellwether  
8 case just there. We were different, we were a better defense  
9 team.

10 THE COURT: What if I let the plaintiff choose two  
11 or three and the defendants if they have two or three that  
12 want to volunteer -- or, well, let me ask that.

13 This isn't binding on your clients, but how many  
14 defendants if they had the choice between being in that first  
15 group or sitting it out for the second group, how many  
16 defendants would want to come into the first group?

17 One, two, three. Anybody else?

18 How many defendants would want to just lay back and  
19 see what happens in the first group?

20 How many are just happy to be here?

21 MR. JONES: I think that kind of answers your  
22 question. I think it also agrees with Mr. Bosy's statement  
23 that we really wouldn't advance the ball that far if we do  
24 that. So that would be my concern.

25 THE COURT: Let me ask you this question next to

1 both sides: If the Court went with a limited number of claim  
2 terms if you can -- if we went with a limited number of claim  
3 terms, a limited number of Markman terms to interpret and in  
4 that manner, what type of time table, how fast of a time table  
5 could that be on for the plaintiff? Because I know from the  
6 plaintiff's standpoint time is money. They want to hang onto  
7 their Markman date on the whole case and their trial date on  
8 the whole case.

9 I guess my question is, could we hang onto that plus  
10 this abbreviated Markman -- I know you don't want to do it;  
11 but if you had to, could that get done in the interim?

12 MR. JONES: I think we could be ready to go on that  
13 interim Markman 60 days.

14 MR. BOSY: I think it would take a little longer  
15 than 60 days. It depends on what discovery could be needed,  
16 but I do believe that procedure could be worked into the  
17 present schedule.

18 THE COURT: Do you believe it could be worked into  
19 the present schedule?

20 MR. JONES: Certainly. We don't believe there is  
21 really a lot of discovery that is needed on any of this on our  
22 plan, but we also want to be reasonable, you know, if they  
23 want some --

24 THE COURT: What would happen to the rest of the --  
25 the rest of the discovery and other aspects of trial

1 development would be stayed pending that?

2 MR. JONES: That is our suggestion. That is  
3 obviously our plan.

4 THE COURT: Plaintiffs?

5 MR. BOSY: Right now I don't think that is a good  
6 idea for us to commit to that. And, again, the reason that I  
7 say that is because we will reduce the claims, they will  
8 present just a few noninfringement arguments, we would go  
9 through that whole process. If they lose, we are back to  
10 square one. Then, you know, we are back to square one. We  
11 have lost our Markman date. We have lost our summary judgment  
12 date. We have lost our trial date.

13 And as I said when I first started here, it is our  
14 intention to try to keep those dates if we can.

15 MR. JONES: Our plan is not to deviate from those  
16 dates. Our plan was to try to work up something in the  
17 current schedule. This is not a veiled motion for  
18 continuance.

19 We also believe the 3-3's and 3-4's take care of the  
20 discovery that is really needed with regard to the issues that  
21 we are trying to raise.

22 THE COURT: All right. I have been reminded that I  
23 have a number of sentencings at 1:30, so I don't think we are  
24 going to have time to come back after lunch. Well, let's --  
25 gosh, we are running out of time.

1           Very briefly on the bifurcation of damages and  
2    liability, let me hear your spin on that. I have read the  
3    papers on those.

4           MR. BOSY: Right. Where we were in the 111 case, we  
5    filed a motion. It was agreed. Then Your Honor asked us all  
6    to respond with respect to all of the other defendants. That  
7    has been done.

8           All of the other defendants except for seven have  
9    agreed that bifurcation is a good idea. So the vast majority  
10   of people in this room agree that bifurcation is a good idea.

11          THE COURT: Why is it a good idea?

12          MR. BOSY: It is a good idea because what is going  
13   to drive this from everybody's perspective, is liability;  
14   probably noninfringement arguments. If we win on those  
15   arguments, there is a high likelihood that cases will settle  
16   out. You know, that is what we feel. They feel the same  
17   thing. We all agree to that.

18          So it is going to -- it would provide efficiencies.  
19   We wouldn't have to go through damage discovery and experts  
20   and all of that. We don't want to do that, and they don't  
21   want to do that if we think we could avoid it. And certainly  
22   we think, you know, there will be a lot of cases that will  
23   settle out if we win, and we are not going to have to do that  
24   with those defendants.

25          So that is really the principal factor that almost

1 everybody in this room agrees to. It is also a good idea from  
2 a trial management standpoint to separate a damages trial,  
3 should there ever have to be one, simply, if for no other  
4 reason, to avoid jury confusion that would be caused by trying  
5 liability, noninfringement, invalidity, and damages all  
6 together. So that I think was our collective belief. You  
7 know, that is the basis upon which we almost all agree.

8 Now, having said that, we, of course, also all do  
9 know that bifurcation is not the general rule here. We know  
10 that. But we do believe that it is a good idea in this  
11 case -- probably not in many others but in this case -- having  
12 said that, I will also say should the Court decide not to  
13 bifurcate, plaintiff is prepared to go ahead with damages in  
14 accordance with the Court's schedule. In other words, we are  
15 not going to need any more time. We will be ready to go. So  
16 whichever way the Court rules, we are ready to adhere to the  
17 Court's schedule.

18 THE COURT: Mr. Jones.

19 MR. JONES: Obviously, most of the defendants agree  
20 with the bifurcation. In the interest of time, I will turn it  
21 over to Mr. Brann who will speak for those that don't agree to  
22 it.

23 THE COURT: Okay.

24 MR. JONES: Thank you, Your Honor.

25 MR. BRANN: Thank you, Your Honor. Peter Brann. I

1 represent Coldwater Creek, Hasbro and J. Jill. As you have  
2 heard, most of the people in the room support bifurcation. We  
3 are in that minority.

4 Before I start I wanted to say quickly that we  
5 believe -- we believe with the points that Mr. Jones has made  
6 earlier today with regard to efficiency. And, indeed, this is  
7 not a "we are opposed to efficiency." Our problem with the  
8 motion to bifurcate is if the rifle shot that was being  
9 described by Mr. Jones is rejected or some of the other things  
10 that the Court is contemplating, that bifurcation doesn't give  
11 you the efficiencies that you really are looking for and what  
12 you really need here.

13 Indeed, what was alluded to, bifurcation is a  
14 discretionary call. The exception and not the rule. We don't  
15 think it really works here. And, indeed, the description from  
16 Mr. Bosy this morning I think really underscored for me why it  
17 is that there is really not a damages model. That is one of  
18 the things we are very interested in.

19 (THIS PORTION OF THE RECORD SEALED BY ORDER OF THE  
20 COURT AT DOCKET NO. 338 AND FILED UNDER SEPARATE COVER.)

21 MR. BRANN: Indeed, some of the other comments this  
22 morning underscore what is really being sold here when you  
23 have 124 defendants in the same case in which what you are  
24 being sold is substantially less to settle with us than to go  
25 to trial. It is not: We have a theory against Hasbro or any

1 of these other folks that gets you to 200,000 or \$20 million  
2 or pick a number out of the sky.

3 Our concern is that this case shouldn't just be  
4 about avoidance of cost of defense. More importantly for the  
5 present purposes it doesn't address the efficiency issue.  
6 That is, because what we are really talking about is after we  
7 have heard, oh, we really want to go forward from the plan.  
8 This, this, and this. We don't really want to lose our date.  
9 We don't want to lose that and that and that.

10 Well, the answer is bifurcation means you are going  
11 to have two proceedings. That is, you are going to go all the  
12 way through on the first one and then you start over and then  
13 evaluate it in terms of the damages later on, and you find out  
14 whether or not there is actually a damages theory.

15 We would submit that there actually isn't one that  
16 would apply, and that would become fairly obviously if they  
17 had to do it. So if the Court isn't prepared to go with one  
18 of the efficiency prospects that we have abdicated, that the  
19 defendants collectively have abdicated, we don't think  
20 bifurcation provides that answer. It gives you two  
21 proceedings and allows the plaintiff in our judgment to hide  
22 the ball on what this case is.

23 THE COURT: Okay. Thank you.

24 MR. BRANN: Thank you.

25 THE COURT: I had one more question for plaintiff I

1 wanted to ask, though. We have got 124 defendants in this  
2 suit. How many more are there out there that you are  
3 contemplating suing?

4 MR. BOSY: Your Honor, let me answer that frankly.  
5 There are many more out there. We are not at present time  
6 contemplating suing them. It is our goal and wish to finish  
7 this case before anything further goes on. That is our wish.

8 THE COURT: Okay. Thank you.

9 Yes, sir.

10 I just need 30 seconds.

11 THE COURT: Okay.

12 MR. BOSY: May I interrupt?

13 THE COURT: Yes.

14 MR. BOSY: The settlement terms, I want to remind  
15 everyone, are confidential. The Dell settlement terms have  
16 been mentioned in open court. And I have an agreement with  
17 Dell not to disclose that to anyone. That's what they wanted,  
18 so I just want --

19 THE COURT: Are you making a motion to seal those  
20 settlement terms --

21 MR. BOSY: Yes.

22 THE COURT: -- or redact those? That is granted.  
23 What else?

24 MR. TOLLEFSON: Thank you, Your Honor, Brian  
25 Tollefson with Rothwell, Figg. We represent LG Electronics,



1 USA.

2 THE COURT: Excuse me.

3 (Discussion between the Court and the Court Reporter.)

4 THE COURT: You want it redacted or sealed?

5 MR. BOSY: That would be better redacted.

6 THE COURT: All right. Just redact that.

7 MR. TOLLEFSON: All right. We join with Mr. Brann  
8 on the opposition of the bifurcation. I just want to add one  
9 small point. LG, like Hasbro, has no sales. Their website is  
10 not used to sell any products.

11 And Mr. Bosy mentioned the range of 200 to 500,000.  
12 He said the high range -- I might have gotten this wrong --  
13 was for product sales of, say, \$200 million a year. And low  
14 range of 200,000 was, say, ten million a year.

15 We have no sales, and it would be completely unfair  
16 for LG to not be able to take any discovery on damages and  
17 obtain their damages theory. We are going to spend more on  
18 electronic discovery than the low range.

19 And the last thing we want -- Mr. Bosy mentioned  
20 jury confusion. The last thing we want is to be in a separate  
21 damages trial with Amazon when we don't have any sales.

22 THE COURT: Okay. Thank you.

23 All right. Anything further?

24 Very well. I thank everyone for a very helpful  
25 discussion. The Court will enter an order shortly.

1 I would like to hear -- when can I hear back from  
2 you with regard to whether you accept defendants' proposal of  
3 if you will limit the three claim terms, then they will also  
4 limit all defendants?

5 That was the offer, wasn't it, Mr. Jones?

6 MR. JONES: It was -- well, let me --

7 THE COURT: Everybody sit down again.

8 Why don't you articulate?

9 MR. JONES: Yes. I knew a number of defendants  
10 would enter into that deal. I know -- not all. I know a  
11 number of defendants would say they would limit it to three  
12 claim terms -- if we could limit it to three claim, we could  
13 get down to three claim terms. Is that correct? Am I saying  
14 it right?

15 MR. MOORE: I would say the defendants would  
16 consider if there was going to be something to streamline them  
17 for the amount of terms for claim construction limited to,  
18 which seemed very important to the plaintiff, then the  
19 defendants would like something in return for that which may  
20 be limited the number of claims. I don't want to lock  
21 ourselves into three and three, but the plaintiff and  
22 defendants can negotiate what may make sense and streamline  
23 the procedure. One thing maybe --

24 THE COURT: You have had months to negotiate.

25 MR. MOORE: That proposal has to be discussed. And

1 while we have the defendants together, we can use the  
2 courtroom right after this.

3 THE COURT: Let me suggest this then: Y'all visit  
4 about that. My sentencings are at 1:30. I will come back  
5 about 1:20. And if you would like to stay, you are all  
6 welcome to come back, or if you make a decision -- and I will  
7 excuse anyone that doesn't wish to be here as long as Mr.  
8 Jones has your permission to speak for you with regard to this  
9 one discrete issue. Okay?

10 MR. JONES: Thank you, Your Honor.

11 THE COURT: See you at 1:20. Be in recess.

12 (Recess was taken.)

13 THE COURT: Please be seated.

14 I actually thought I was walking into the  
15 sentencing. It is a nice-looking group of criminal  
16 defendants.

17 [Laughter]

18 THE COURT: Have y'all had a chance to meet and  
19 confer?

20 MR. BOSY: We have a position, Your Honor. For the  
21 procedure Your Honor had asked us about, we would propose five  
22 claims and five claim terms for defendants.

23 The timing proposal is this: We would give them our  
24 claims on March 15th, and they would give us their  
25 construction a week later. I think that is enough time for us

1 to talk with their experts and our inventor and try to decide  
2 which claims we want to use, and a week should be good enough  
3 for them because it sounds like they pretty much know what  
4 they are going to do, but I think we should have a time to at  
5 least exchange. Otherwise, it could got on for a long time.  
6 That sounds like a good thing to me.

7 Then what I would suggest is once we get those  
8 exchanges, we take a look at it, decide whether we need  
9 discovery, decide how we want to proceed, what kind of  
10 briefing we need, and then get together and make a submission  
11 to the Court with the suggestion as to what we want to do;  
12 when the briefs will be filed, how long they would be, whether  
13 affidavits are needed and so forth.

14 THE COURT: Briefing with regard to?

15 MR. BOSY: Well, the issue of claim construction.

16 THE COURT: Okay.

17 MR. BOSY: And their noninfringement arguments.

18 THE COURT: Okay. All right.

19 MR. BOSY: I take it Your Honor would want briefs on  
20 that.

21 THE COURT: Oh, yes.

22 All right. Mr. Jones.

23 MR. JONES: I specifically want to answer the  
24 question the Court left with me. And I do have a specific  
25 answer, and unfortunately the defendants could not agree to

1 the deal, which would be they limit themselves to three  
2 claims, we limit ourselves to three claim terms.

3 There was some interest in that. I would say the  
4 biggest problem was getting back to clients as many clients as  
5 was involved and committing themselves to that in its  
6 entirety.

7 But I don't know that we would ever get there on all  
8 these defendants. I think the answer to that question was,  
9 no, to that commitment.

10 With regard to this proposal about early -- I think  
11 it is early Markman, basically, is the way I understand this  
12 proposal. I don't -- having heard that, I don't have a  
13 definitive position from all of the clients because,  
14 unfortunately many of those defendants left when we were  
15 answering the first question. But I think as far as an  
16 earlier Markman process, I think there is interest on the  
17 defendants' part with regard to that. I think definitely that  
18 is true.

19 THE COURT: But all defendants did agree that if  
20 plaintiff agrees by March 1 to -- did you say March 1?

21 MR. BOSY: March 15th.

22 THE COURT: March 15th.

23 MR. BOSY: Yes.

24 THE COURT: March 15th to identify and limit their  
25 action to five claims without any right to proceed on the

1 other claims later, right?

2 MR. BOSY: Right.

3 THE COURT: That defendants would agree to then  
4 identify five claim terms that they want the Court to  
5 construe; and that that would be the limit of the claim terms,  
6 right?

7 MR. JONES: No, that agreement was not reached, Your  
8 Honor. In fact, that proposal has not been made while the  
9 defendants were even still here. We dealt with the first  
10 proposal that the Court made. And you instructed all of the  
11 defendants not to leave until I had their authority to answer  
12 that question. I do, and unfortunately the answer is no.

13 Now, this proposal, which has not been made to all of  
14 them -- in fact, has been made to us very, very recently --  
15 within minutes -- I think there well may be some interest in  
16 that. But I do not have authority to bind the various  
17 defendants nor probably even my clients now.

18 But I would be happy to get back to the Court with a  
19 response to that if you could give us, say, a week. With this  
20 group, it is just unwieldy to get them all together. If I can  
21 get them together as quick as I can and give you a response to  
22 this proposal.

23 MR. BOSY: Yes, Your Honor. That sounds like a good  
24 way to start. If the defendants could get back to, say, my  
25 suggestion, five claims, five claim terms, if that works then

1 we can agree on an exchange date --

2 THE COURT: Then there would not have to be a second  
3 Markman, right?

4 MR. BOSY: Right. We would agree on an exchange  
5 date and decide amongst ourselves how many pages of briefs we  
6 need and so forth, make a proposal to the Court for briefing.  
7 And that is a way to get this going forward.

8 THE COURT: And if defendants cannot agree to that,  
9 what is plaintiffs' position at that point?

10 MR. BOSY: Well, if plaintiffs (sic) cannot agree to  
11 that, I suppose we are back to the Court's schedule in the  
12 usual case. And absent another proposal from the defendants,  
13 I don't know what else to do.

14 MR. JONES: Again, I don't have the authority, Your  
15 Honor, to bind anybody. I think there would be interest on  
16 the defendants' part to discuss that.

17 THE COURT: Okay. All right. Let's see, today is  
18 Monday. Can you get back with us by, say, noon on Monday next  
19 week?

20 MR. JONES: Today is Tuesday, Your Honor.

21 THE COURT: Time flies.

22 MR. JONES: I don't even know people's names. By  
23 noon on Monday I think is doable.

24 THE COURT: Notify us if you have an agreement. If  
25 you don't, the Court will proceed and enter an order.

1 Thank you.

2 MR. JONES: Thank you, Your Honor.

3 MR. BOSY: Thank you.

4 (Proceedings concluded.)

5

6 C E R T I F I C A T I O N

7

8 I certify that the foregoing is a correct transcript from the

9 record of proceedings in the above-entitled matter.

10

11

12 /s/ Shea Sloan

13 SHEA SLOAN, CSR, RPR

14 OFFICIAL COURT REPORTER

15 STATE OF TEXAS NO. 3081

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